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No. 281 123

In the Supreme Court of the United States

OCTOBER TERM, 1959

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

AMERICAN DREDGING COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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AMERICAN DREDGING COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The National Labor Relations Board prays that a writ of certiorari issue to review that part of the decision of the United States Court of Appeals for the Third Circuit entered in the above-entitled case on January 8, 1960, which denied enforcement of the reimbursement provisions of the Board's order.

OPINIONS BELOW

The opinion of the Court of Appeals (Appendix, pp. 9–13, *infra*) is reported at 276 F. 2d 286. The findings of fact, conclusions of law, and order of the Board (R. 3a–12a, 14a–53a) [1] are reported at 123 NLRB No. 18.

JURISDICTION

The decree of the Court of Appeals (Appendix, pp. 13–17, *infra*) was entered on February 11, 1960,

[1] "R" references are to the appendix to petitioner's brief in the court below.

and amended on March 18, 1960. A petition for rehearing (Appendix, p. 17, *infra*) was denied on April 26, 1960. On March 30, 1960, Mr. Justice Brennan extended the time for filing certiorari to and including June 6, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Board, as a remedy for a hiring arrangement between the employer and the union which unlawfully conditions employment upon union membership, may require that the employees be reimbursed for all dues and other monies which they paid to the union under that arrangement.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*) are as follows:

> SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

SEC. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective-bargaining unit covered by such agreement when made * * * and (ii) unless following an election held as provided in section 9(e) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: * * *

* * * * *

SEC. 10(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: * * *

* * * * *

STATEMENT

A. THE BOARD'S FINDINGS

On October 1, 1955, respondent and Local 825 (Dredgman's Branch), International Union of Operating Engineers, executed a three-year contract. Section 25 of the contract provided in pertinent part that "the Hiring Engineer [would] obtain the personnel in the classifications covered by this Agreement" (R. 18a–19a; 57a). Hiring Engineer Patterson was a member of Local 825 (R. 30a, 57a, 69a–70a). As such, he was obligated under Article XXXIII of the International Union's Constitution to "hire none but those in good standing with a Union having jurisdiction over the work to be done" (R. 30a; 58a–59a). Patterson in fact hired only employees referred for employment "through the Union hall" (R. 31a; 71a).

Under Section 4 of its contract with the Union, respondent agreed, "effective on any date permitted by law," to "employ and retain in employment only members of the Union in good standing," except where

union men were not available within 72 hours. Respondent further agreed to replace with a union man any non-union employee who did not apply for membership in the Union "within a period of 7 days, exclusive of date of employment" (R. 17a; 56a).

Under the contract's grievance and arbitration procedure, the Union's Shop Steward, the Hiring Engineer, the Union's Business Agent, and a representative of the International Union successively represented the employees in presenting grievances to management representatives (R. 18a; 19a). The contract further provided that the parties shall jointly select the Hiring Engineer, and that respondent shall pay him $150 per week for performing his duties under the contract (R. 24a; 57a–58a).

B. THE BOARD'S CONCLUSIONS AND ORDER

The Board concluded that, by the foregoing contract provisions, respondent violated Section 8(a)(1), (2) and (3), of the Act.[2] In the Board's view, the provision delegating hiring authority to the Hiring Engineer in effect conditioned employment on union membership, because of the Engineer's obligation under the International Union's Constitution to hire only union members (R. 8a, 30a–32a). Moreover, the illegal closed shop imposed by this provision demonstrated that the contracting parties did not in fact defer the union-security provisions of the contract, which were unlawful on their face in providing less than the 30 days required by the proviso to Section 8(a)(3), but made them immediately operative (R.

[2] No charge was filed against the Union.

8a, 32a–33a).[3] Finally, the payment by respondent of $150 per week to the Hiring Engineer, a supervisory employee, for performing grievance functions on behalf of the Union constituted illegal financial assistance to the Union (R. 23a–27a).

The Board's order (R. 9a–14a) requires respondent to cease and desist from the unfair labor practices found, and from in any other manner restraining its employees in the exercise of their organizational rights. The order also requires respondent to withdraw and withhold recognition from the Union unless and until it shall have demonstrated its majority status in a Board-conducted election; to reimburse present and former employees for all monies paid to the Union under the unlawful provisions of the contract; and to post appropriate notices.

C. THE DECISION OF THE COURT OF APPEALS

The Court of Appeals sustained the Board's unfair labor practice findings, and granted enforcement of its order, except that portion requiring reimbursement of monies paid to the Union. The court stated (Appendix, p. 12, *infra*):

> In the circumstances of this case, we cannot perceive how reimbursing employees who the evidence shows were all union members for ini-

[3] The union-security provisions were also unlawful in that the Union was not in compliance with Section 9(f), (g) and (h) of the Act when the contract was signed, or at any time within the preceding twelve months (R. 34a; 57a).

> tiation fees, dues and other monies paid to the union could in any way effectuate the policies of the Act. This case involves preferment of union members for employment, and thus it is incomprehensible to us how reimbursing them for initiation fees, dues payments, etc., paid to their union can be anything but a windfall to the employees and an unjust penalty to the employer. This was certainly no purpose of the National Labor Relations Act. [Footnote omitted.]

REASONS FOR GRANTING THE WRIT

This case presents the same question as that involved in Nos. 846, 929, 937 and 978, this Term,* *viz*, whether the Board, as a remedy for hiring practices which unlawfully encourage union membership, may require that all monies paid by the employees to the union while subjected to those practices be repaid to them. As shown in the Board's petition in No. 929, the question is of importance in the administration of the Act, and there is a conflict of decisions on the point. In order to preserve the Board's position on the issue in the instant case, a review of the decision of the court below must likewise be requested.

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* *Local 60, United Brotherhood of Carpenters* v. *National Labor Relations Board; National Labor Relations Board* v. *Local 357, International Brotherhood of Teamsters; National Labor Relations Board* v. *Local Union No. 85, Sheet Metal Workers' International Association; National Labor Relations Board* v. *Morrison-Knudsen Co., et al.*

CONCLUSION

For these reasons, the present petition should be granted, or, in the alternative, held in abeyance pending a decision on the question in the other cases.

Respectfully submitted.

STUART ROTHMAN,
General Counsel,
DOMINICK L. MANOLI,
Associate General Counsel,
NORTON J. COME,
Assistant General Counsel,
National Labor Relations Board.

I authorize the filing of this petition for a writ of certiorari.

J. LEE RANKIN,
Solicitor General.

JUNE, 1960.

APPENDIX

In the United States Court of Appeals for the Third Circuit

No. 12918

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

AMERICAN DREDGING COMPANY, RESPONDENT

On Petition for Enforcement of an Order of the National Labor Relations Board

Argued December 8, 1959

Before KALODNER, STALEY and HASTIE, *Circuit Judges*

OPINION OF THE COURT

(Filed January 8, 1960)

By STALEY, *Circuit Judge*:

The primary issue presented by this petition is the appropriateness of the National Labor Relations Board's (Board) order requiring the American Dredging Company (respondent) to reimburse its employees for initiation fees, dues and other monies paid to Local 825 (Dredgemen's Branch), International Union of Operating Engineers, AFL–CIO (union).

The Board here seeks enforcement of its order[1] issued against the respondent pursuant to Section 10

[1] The Board's decision and order are reported at 122 N.L.R.B. No. 92.

(c) of the National Labor Relations Act, 29 U.S.C. § 151 et seq. The Board, sustaining its trial examiner, found that respondent had violated Section 8(a) (1), (2), and (3) of the Act in that it contributed illegal financial assistance to the union by compensating one of respondent's supervisors to represent the interests of the employees in grievance matters; violated the Act by maintaining and giving effect to illegal closed shop hiring provisions in the collective bargaining contract between respondent and the union; and, by unlawfully delegating its hiring authority to a member of the union, bound as such by the international union's constitution to hire only members of the union, in effect agreed to operate under an illegal closed shop agreement in contravention of the Act. The facts of record sustain the findings of the Board.

The respondent devoted little attention in its brief and oral argument to its contention that there was an absence of substantial evidence in the record to support the findings of the Board. It is manifestly clear from a reading of the record that the findings and conclusions are amply supported. However, the respondent vigorously challenges the appropriateness of the affirmative remedy proposed by the Board, and discussion of this aspect of the case appears warranted.

Specifically, the issue is drawn in regard to Section 2(b) of the Board's order, which provides that respondent shall:

> 2. Take the following affirmative action, which the Board finds will effectuate the policies of the Act:
>
> * * * * *
>
> (b) Reimburse its employees and former employees for monies illegally exacted from them in the manner and to the extent set forth in "The Remedy" section of this Decision and Order.

This remedy, which is referred to by the Board as the *Brown-Olds* remedy,[2] was not recommended by the trial examiner but added by the Board upon motion of the General Counsel.

We are cognizant that our authority to deny enforcement to orders of the Board is not unlimited. As the Supreme Court stated in *National Labor Relations Board* v. *Warren Company*, 350 U.S. 107, 113 (1955), "The granting or withholding of such remedial action is not wholly discretionary with the courts. This is true not only under the National Labor Relations Act but also under general principles of equity jurisprudence." The oft-stated principle enunciated in *National Labor Relations Board* v. *Seven-Up Bottling Co.*, 344 U.S. 344, 346–347 (1953), succinctly sets forth the standard: "When the Board, 'in the exercise of its informed discretion,' makes an order of restoration by way of back pay, the order 'should stand unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act.' "[3]

In a number of cases we have had occasion to deny enforcement based on these principles. In those cases

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[2] The remedy takes its name from the case of United Association of Journeymen & Apprentices of Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO (J. S. Brown-E. F. Olds Plumbing & Heating Corporation), 115 N.L.R.B. 594.

[3] In National Labor Relations Board v. Bradford Dyeing Assn., 310 U.S. 318, 342 (1940), it was stated:

> "If the Board has acted within the compass of the power given it by Congress, has, on a charge of unfair labor practice, held a 'hearing,' which the statute requires, comporting with the standards of fairness inherent in procedural due process, has made findings based upon substantial evidence and has ordered an appropriate remedy, a like obedience to the statutory law on the part of the court of

we said that since the powers conferred on courts of appeal by the Act are equitable in nature, they "may be invoked only if the relief sought is consistent with the principles of equity." *National Labor Relations Board* v. *Kingston Cake Co.*, 206 F. 2d 604, 611 (C.A. 3, 1953); *National Labor Relations Board* v. *Globe Automatic Sprinkler Co.*, 199 F. 2d 64 (C.A. 3, 1952); *National Labor Relations Board* v. *National Biscuit Co.*, 185 F. 2d 123 (C.A. 3, 1950).

In the circumstances of this case, we cannot perceive how reimbursing employees who the evidence shows were all union members for initiation fees, dues and other monies paid to the union could in any way effectuate the policies of the Act. This case involves preferment of union members for employment, and thus it is incomprehensible to us how reimbursing them for initiation fees, dues payments, etc., paid to their union can be anything but a windfall to the employees and an unjust penalty to the employer.[4] This was certainly no purpose of the National Labor Relations Act.

It is also noteworthy that the remedy proposed by the Board is so lacking in specificity as to be unenforceable. Although the respondent's liability is limited to the period beginning six months prior to

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appeals requires the court to grant enforcement of the Board's order."

We do not consider the opinion, however, as holding that a court of appeals has no power to refuse to enforce a particular part of the order which it deems not reasonably calculated to effectuate the policies and purposes of the Act. This interpretation, we think, is in line with both the language and decision in the cases cited in the body of this opinion.

[4] This is not the case of a company-sponsored union, and therefore such cases are hardly apposite. See, i.e., *Virginia Electric & Power Co.* v. *National Labor Relations Board*, 319 U.S. 533 (1943).

the filing of charges, it encompasses initiation fees, dues, and assessments paid to the union. The record is barren of any evidence indicating that any employee was required to join the union to obtain a job with the respondent; on the contrary, the record supports the finding of discrimination in employment by hiring only union members. Just what initiation fees are to be reimbursed? For aught that appears, reimbursement is to be made to any new union members (those who joined the union within six months of the filing of charges) although they did not join the union in specific contemplation of a job with respondent.

The order of the Board as modified herein will be enforced. A proposed decree may be submitted.

In the United States Court of Appeals for the Third Circuit

No. 12918

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

AMERICAN DREDGING COMPANY, RESPONDENT

DECREE ENFORCING AN ORDER, AS MODIFIED, OF THE NATIONAL LABOR RELATIONS BOARD

Before KALODNER, STALEY, and HASTIE, *Circuit Judges*

THIS CAUSE came on to be heard upon the petition of the National Labor Relations Board to enforce its order dated March 12, 1959. The Court heard argument of respective counsel on December 8, 1959 and has considered the briefs and transcript of record filed in this cause. On January 8, 1960 the Court being fully advised in the premises, handed down its opinion enforcing as modified, the Board's said Order. In conformity therewith it is hereby

ORDERED, ADJUDGED AND DECREED by the United States Court of Appeals for the Third Circuit that American Dredging Company, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(*a*) Contributing financial support to Local 825 (Dredgemen's Branch), International Union of Operating Engineers, AFL-CIO, or to any other labor organization, by compensating any of its supervisors to represent the interests of its employees in grievance matters;

(*b*) Delegating its hiring authority to any person who is obligated to employ only members of the above-named labor organization, or of any other labor organization;

(*c*) Recognizing the above-named labor organization, or any successor thereto, as the representative of any of its employees for the purposes of collective bargaining with respect to grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of employment, unless and until such labor organization shall have demonstrated its exclusive majority representative status pursuant to a Board conducted election among the Respondent's employees;

(*d*) Performing, maintaining, enforcing, or giving effect to the contract of October 1, 1955, between the Respondent and the above-named labor organization, or any extension, renewal, modification, or supplement thereof, unless and until such labor organization shall have demonstrated its exclusive majority representative status pursuant to a Board conducted election among the Respondent's employees;

(*e*) Encouraging membership in the above-named labor organization, or in any other labor organization, by performing, maintaining, enforcing, or giving effect to any contract, agreement, understanding or

arrangement whereby preference in hiring or tenure of employment is accorded members of the above-named labor organization, or of any other labor organization, except as authorized by Section 8(a)(3) of the Act;

(*f*) In any other manner interfering with, restraining, or coercing its employees or applicants for employment in the exercise of their rights under Section 7 of the Act, except as permitted by Section 8(a)(3) of the Act.

2. Take the following affirmative action, which the Board has found will effectuate the policies of the Act:

(*a*) Withdraw and withhold all recognition from Local 825 (Dredgemen's Branch), International Union of Operating Engineers, AFL–CIO, as the representative of any of its employees for the purposes of collective bargaining with respect to grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of employment, unless and until such labor organization shall have demonstrated its exclusive majority representative status pursuant to a Board-conducted election among the Respondent's employees;

(*b*) Post copies of the notice attached hereto, marked Appendix, at its main office at Philadelphia, Pennsylvania, and at all its other establishments which service dredging work in the territory described in the contract of October 1, 1955, between it and the above-named labor organization. Copies of the said notice, to be furnished by the Regional Director for the Fourth Region of the National Labor Relations Board, Philadelphia, Pennsylvania, shall, after being duly signed by the Respondent's representative, be posted by it immediately upon receipt thereof and maintained by it for sixty (60) consecutive days there-

after in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that these notices are not altered, defaced, or covered by any other material;

(*c*) Notify the said Regional Director, in writing, within twenty (20) days from the date of this Decree, what steps it has taken to comply with the foregoing recommendations.

By the Court:

STALEY, *Circuit Judge.*

Dated: February 11, 1960.

In the United States Court of Appeals for the Third Circuit

No. 12918

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

AMERICAN DREDGING COMPANY, RESPONDENT

Present: STALEY, KALODNER and HASTIE, *Circuit Judges*

It having appeared at a hearing in this cause after decree that the National Labor Relations Board did not submit notices to the employer for posting as required by the decree of February 11, 1960, until several weeks after the entry of said decree that is, March 15, 1960; and it further appearing that the running of the period of posting of notices is delaying the holding of the election of a bargaining representative as contemplated by said decree; and it further appearing that the unfair labor practice which is the subject of this proceeding occurred in 1958; and the Court being

satisfied that the election of a bargaining representative should not be long delayed; it is hereby

ORDERED, That paragraph 2(b) of the final decree of this Court entered in this cause on February 11, 1960, be and it is hereby modified by reducing the period of publication of notice by the employer from sixty (60) days to fifteen (15) days.

By the Court:

KALODNER, *Circuit Judge.*

Dated: March 18, 1960.

In the United States Court of Appeals for the Third Circuit

No. 12918

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

AMERICAN DREDGING COMPANY, RESPONDENT

SUR PETITION FOR REHEARING

Present: KALODNER, STALEY and HASTIE, *Circuit Judges*

After due consideration the petition for rehearing in the above-entitled case is hereby denied.

By the Court:

STALEY, *Circuit Judge.*

Dated: April 26, 1960.

U.S. GOVERNMENT PRINTING OFFICE: 1960